COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1194-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

HAZEL I. WRIGHT AND STEVEN WRIGHT,

PLAINTIFFS-APPELLANTS,

V.

WAL-MART STORES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. This is an appeal from a judgment dismissing a personal injury claim involving the safe place statute.[1] The plaintiffs, Hazel and Steven Wright, claim the trial court erred first when it instructed the jury that she

[1] This is an expedited appeal under RULE 809.17, STATS.

had to prove the defendant, Wal-Mart Stores, Inc., had actual or constructive notice of the injury-causing defect and, second, by failing to instruct the jury that the Wrights are relieved of proving notice if Wal-Mart's affirmative act caused the dangerous condition. Wal-Mart claims that the jury was properly instructed and that the Wrights waived any objection to omissions in the instructions by failing to request the notice-exception language at the instruction conference. We hold that the court erred by not instructing the jury on the exception to the notice requirement, thereby preventing a full trial of the real controversy. Accordingly, we reverse and remand for a new trial.

The Wrights sued Wal-Mart as a result of an injury Hazel sustained when she slipped and fell in the latter's Eau Claire store.[2] Hazel fell next to some tires that were stacked on the floor. She and Wal-Mart employees noticed a white powder the shape and size of a tire on the spot where she slipped. Wal-Mart employees testified at trial that the slippery spot was in the area where tires are normally stacked, and one employee opined that the powder was transferred from a tire to the floor. There was, however, neither first-hand nor expert evidence as to how the slippery spot was formed nor how long it had been there. Hazel and the other witnesses agreed that they could not see the powder prior to the fall. The jury heard evidence that Wal-Mart employees swept and observed the area daily. Hazel concedes that she could not prove that Wal-Mart had either actual or constructive notice of the dangerous condition.

During the instruction conference, Wal-Mart requested the pattern "safe-place statute" instruction, WIS JI—CIVIL 1900.4. The instruction's last

[2] The injury actually occurred in Sam's Club, which is owned by Wal-Mart. To avoid confusion, this decision will refer only to Wal-Mart.

paragraph provides that the plaintiff must prove that the defendant had actual or constructive notice of the defect that allegedly caused the injury.[3] There is, however, an exception to the notice requirement. When the defendant's active negligence creates the hazardous condition, the injured party need not prove notice of the defect or dangerous condition. ***Kosnar v. J.C. Penney Co.***, 6 Wis.2d 238, 242, 94 N.W.2d 642, 644 (1959).[4] This exception is not addressed in the pattern instruction.

The Wrights objected to the notice language in the instruction. They argued that the evidence proved Wal-Mart caused the defect and therefore they should not have to prove notice. The trial court discerned that deleting the notice language from the instruction was tantamount to finding as a matter of law that Wal-Mart actively caused the slippery spot, because the plaintiff is only relieved of proving notice if the defendant's affirmative act creates the defect. Yet, the trial court observed that there was only inferential, nondispositive proof of cause, leaving this element and, in turn, notice, at issue. It thus refused to strike the notice language. The Wrights did not ask the court to instruct the jury that

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[3] WIS J I-CIVIL 1900.4 provides:

> To find that (defendant) failed to (construct) (repair) or (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation.

[4] Where a defect or a dangerous condition is caused by the affirmative acts of the owner or his agent, he needs no notice because he has knowledge of his acts creating the hazard. ***Merriman v. Cash-Way, Inc.***, 35 Wis.2d 112, 116, 150 N.W.2d 472, 475 (1967); ***Kosnar v. J.C. Penney Co.***, 6 Wis.2d 238, 242, 94 N.W.2d 642, 644 (1959).

they were relieved of proving notice if it found that Wal-Mart caused the condition, nor did the trial court include such language *sua sponte*.

The purpose of jury instructions is to advise the jury how to apply the law and to enable it to intelligently perform its function. ***Haefner v. Batz Seed Farms,*** 255 Wis. 438, 440, 39 N.W.2d 386, 387 (1949). The trial court has broad discretion when instructing the jury, including the determination of which instructions will be given, so long as it fully and fairly informs the jury of the principles of law applicable to the case. ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis.2d 337, 344-45, 564 N.W.2d 788, 792 (Ct. App. 1997). However, the trial court erroneously exercises its discretion if the instructions given do not adequately cover the law. ***Frayer v. Lovell,*** 190 Wis.2d 794, 805, 529 N.W.2d 236, 241 (Ct. App. 1995). If the court erred by instructing the jury and the error was prejudicial, the judgment must be reversed. ***Fischer v. Ganju***, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). An error is prejudicial if it "probably" misled the jury. ***Id.*** at 850, 485 N.W.2d at 16.

The Wrights first contend that the trial court should not have instructed the jury that Wal-Mart's liability depended in part upon proof of notice of the hazardous condition. Striking the notice element would only be appropriate if the evidence compelled the exclusive conclusion that Wal-Mart's affirmative act caused the powder to be on the floor. The record demonstrates, however, that Wal-Mart's affirmative actions were genuinely in dispute. Indeed, there was no proof of how the substance came to be on the floor, let alone evidence showing whose or which act created the defect. The trial court correctly concluded that striking the notice element was tantamount to finding that Wal-Mart actively created the condition, which the record would not unequivocally support. We

therefore reject the Wrights' contention that the trial court should have deleted the proof-of-notice language from the pattern safe-place statute jury instruction.

The Wrights next argue that the trial court should have instructed the jury that they need not prove that Wal-Mart had notice of the dangerous condition if it found that Wal-Mart's affirmative act caused the condition. Wal-Mart contends that the Wrights' failure to request an "active negligence notice exception" instruction waived appellate review of the issue. A party who fails to object to a jury instruction or lack thereof at the instruction conference waives the right to challenge the instruction on appeal. ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992). In this case, however, the Wrights did object to the instruction as given. While they failed to explicitly request that the jury be instructed on the active negligence exception to the notice requirement, they brought the precise issue before the court. The need to address the exception in order to preserve the issue of Wal-Mart's negligence should have been apparent. Even if the omission constituted waiver, however, we may still order a new trial if the real controversy in action was not fully tried. ***State v. Ambuehl***, 145 Wis.2d 343, 371, 425 N.W.2d 649, 660 (Ct. App. 1988); § 752.35, STATS.

We conclude that the trial court did not fully or adequately instruct the jury on the notice element. Moreover, regardless of the Wrights' failure to expressly request the active-negligence notice exception, the jury's inability to consider an exception instruction prevented the real issue from being tried. The court correctly perceived as a jury issue Wal-Mart's alleged failure to maintain the premises in a reasonably safe condition. Yet, instructing the jury as to the notice requirement without informing it of an exception provided the jury with no reason to go beyond the notice issue and consider the question of negligence, because there was concededly no evidence that Wal-Mart had notice of the defect. Under

the instructions given, Wal-Mart could not be liable absent proof of notice, regardless whether it was negligent. Thus the instruction as given probably misdirected the jury from the real issue in controversy, Wal-Mart's role in creating the slippery condition.

We appreciate the enormous demand the law places upon the trial court in an instruction conference. Often the larger context in which an issue arises is obscured by an argument that approaches the issue from one of several available perspectives, and which focuses the court's and counsel's attention with particular intensity on that perspective.[5] The trial court nonetheless is responsible for insuring that its jury instructions fully and accurately reflect the law applicable to the facts of the case and sufficiently apprise the jury of the issues that will be submitted to it. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 149, 442 N.W.2d 598, 602 (1989). Therefore, to insure that the true controversy is tried the jury instructions must fully account for the legal consequence that ensue from each argument. While the trial court's connection with the nuances of a case is typically more remote than the litigants' and may be further obscured by the heat of argument, still, if the court understandably falls short of the duty to fully instruct the jury, we must reverse. This result is preferable to depriving a party of a trial of the real controversy.

We conclude that the trial court correctly instructed the jury that defendants such as Wal-Mart, subject to the safe place statute, normally cannot be held liable unless they have notice of the dangerous condition. It erred, however,

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[5] In this case, for example, the court's and counsels' attention was riveted solely upon the Wrights' request that the court delete the notice requirement from the standard safe place instruction.

by not further explaining the affirmative causal act exception to the notice requirement. There was no evidence of notice. The jury therefore had no reason to go beyond the notice issue to consider whether Wal-Mart created the dangerous condition. Yet the latter question appears to be the real controversy at issue. The error, then, prevented the true controversy from being tried. Under these circumstances, we exercise our discretion to reverse the judgment and remand for a new trial at which the jury is to be instructed as to the exception to the notice requirement.

By the Court.—Judgment reversed and cause remanded.

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